

STATE OF DELAWARE,

Plaintiff,

v.

FLOYD L. MILLS,

Defendant.

Cr. ID No. 1307023821

Decided: February 25, 2020

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED
AND
RULE 61 COUNSEL'S MOTION TO WITHDRAW SHOULD BE
GRANTED.**

Cynthia F. Hurlock, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Patrick J. Collins, Esquire, Attorney for Defendant Floyd Mills

PARKER, Commissioner

This 25th day of February 2020, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND, FACTS AND PROCEDURAL HISTORY

1. On July 29, 2013, Defendant Floyd L. Mills was arrested in connection with a robbery at a social club in Wilmington.
2. Shortly after midnight on July 29, 2013, a robbery occurred at Baron's Social Club on Claymont Street in Wilmington, Delaware.¹ The victims called the police and reported that a black male, approximately 5'7" to 5'9", wearing a gray ski mask, an army green shirt and fatigue-style camouflage pants, robbed them at gunpoint.² The robber stole several bottles of liquor and \$250 in cash from the register.³
3. The responding officer Patrolman Tabron received a call from a tipster advising that Floyd Mills had come to his house, told him he robbed a store, and asked the witness to hold the gun for him. Then, at Mills' request, the witness walked Mills to 2510 Thatcher Street where the witness observed Mills placing several items of clothing inside a clothes dryer there.⁴
4. The police went to 2510 Thatcher Street and arrested Mills as he was exiting the back door of the residence. When arrested, Mills dropped cash and a bottle of

¹ *Mills v. State*, 2016 WL 97494, *1 (Del.)

² *Mills v. State*, 2016 WL 97494, *1 (Del.); August 6, 2013 Preliminary Hearing Transcript, at pgs. 4-7.

³ *Id.*

⁴ *Mills v. State*, 2016 WL 97494, *1 (Del.); July 29, 2013 Affidavit and Application for Search Warrant of 2510 Thatcher Street residence, attached as an exhibit to Defendant's Appendix to Memorandum in Support of Rule 61 Counsel's Motion to Withdraw, at A67.

liquor, which was one of the bottles taken in the robbery.⁵ A search of the residence revealed in the dryer a ski mask, gloves, and clothing similar to those worn by the robber.⁶ Mills' DNA was later found on these items.⁷

5. Following his arrest, Mills made incriminating statements to the police.⁸

6. On October 14, 2013, a New Castle County grand jury indicted Mills on two counts of Robbery First Degree, two counts of Possession of a Firearm During Commission of a Felony ("PFDCF"); two counts of Possession of a Firearm by a Person Prohibited ("PFBPP"); and wearing a disguise during the commission of a felony.

7. In January 2014, Mills, through his defense counsel, filed a motion to suppress the evidence seized during the searches of 2510 Thatcher Street and Mills' incriminating statements to the police. The Superior Court denied the motion to suppress after a hearing.⁹

8. On November 7, 2014, Mills entered into a *Robinson* plea to one count of Robbery First Degree and a guilty plea to PFBPP. Apparently, Mills was severely intoxicated on the night of robbery and there were parts of the night that Mills did not remember. Mills recognized, however, that the State had sufficient evidence to

⁵ *Mills v. State*, 2016 WL 97494, *1 (Del.); October 3, 2014 Suppression Hearing Transcript, at pgs. 18-19; August 6, 2013 Preliminary Hearing Transcript, at pgs. 10-11.

⁶ *Mills v. State*, 2016 WL 97494, *1 (Del.); August 6, 2013 Preliminary Hearing Transcript, at pg. 11.

⁷ November 7, 2014 Plea Transcript, at pg. 11.

⁸ *Mills v. State*, 2016 WL 97494, *1 (Del.).

⁹ See, October 3, 2014 Suppression Hearing Transcript, at pgs. 118-127.

move forward and convict him of the charges stemming from the robbery at issue. Mills was permitted to enter into a *Robinson* plea as to the Robbery First Degree charge, in which he would be deemed guilty but would not have to admit his guilt.¹⁰ As to the PFBPP charge, Mills plead guilty. The gun was found in his bedroom where he had identification next to the firearm.¹¹

9. As part of the plea agreement, the parties agreed to jointly recommend an 18-year (minimum-mandatory) unsuspended prison sentence. Although Mills qualified to be sentenced as a habitual offender under 11 *Del. C.* §4214(b), requiring the imposition of a mandatory life sentence, the State agreed to seek sentencing as a habitual offender only under §4214(a) on the lesser of the two felony offenses, the PFBPP charge.¹² By agreeing to seek habitual offender status only under §4214(a), and only for the lesser of the two felony offenses, the PFBPP charge, Mills was facing a 15 year minimum-mandatory sentence up to a life sentence on that charge rather than a mandatory life sentence.

10. As part of the plea agreement, Mills expressly agreed that he would not oppose the State's motion to have him declared a habitual offender under §4214(a) on the PFBPP charge. In addition, as part of the plea, the State agreed to dismiss all the remaining charges of the indictment.¹³

¹⁰ November 7, 2014 Plea Transcript, at pgs. 4-6.

¹¹ *Id.*

¹² Superior Court Docket No. 46- Plea Agreement dated November 7, 2014.

¹³ Superior Court Docket No. 46- Plea Agreement dated November 7, 2014.

11. On January 28, 2015, Mills submitted a *pro se* letter seeking to withdraw his plea. By letter dated February 18, 2015, the Superior Court denied Mills' request to withdraw the plea.¹⁴ The Superior Court concluded that there was no procedural defect in taking the plea, that Mills' knowingly and voluntarily consented to the plea agreement, and that Mills had no basis to assert legal innocence.¹⁵

12. On March 13, 2015, the Superior Court accepted the parties joint sentence recommendation and sentenced Mills as a habitual offender under 11 *Del. C.* § 4214(a) on the PFBPP charge to the minimum-mandatory sentence of 15 years of unsuspended Level V time. On the Robbery First Degree charge, Mills was sentenced to ten years at Level V, suspended after three years minimum-mandatory, followed by probation. Thus, Mills was sentenced to the parties agreed upon sentence recommendation of a total of 18 years unsuspended Level V time.

13. Mills filed a direct appeal to the Delaware Supreme Court. On appeal, the Delaware Supreme Court affirmed the judgment of the Superior Court.¹⁶ The Delaware Supreme Court held that the Superior Court properly denied Mills' motion to withdraw his guilty pleas since Mills had knowingly and voluntarily entered into the plea and that there was no basis to allow the withdrawal of the plea.¹⁷

¹⁴ Superior Court Docket No. 50- February 18, 2015 letter denying Mills' request to withdraw his plea.

¹⁵ *Id.*

¹⁶ *Mills v. State*, 2016 WL 97494 (Del.).

¹⁷ *Id.* at 2-3.

14. In July 2016, Mills filed a motion for correction of sentence. Mills claimed that the PFBPP should have been a Class D felony, not a Class C felony, and that he should not have received a 15-year minimum-mandatory sentence as a habitual offender on that charge.¹⁸

15. On October 20 2016, the Superior Court denied the motion for correction of sentence.¹⁹ The Superior Court explained that while PFBPP is generally a Class D felony, when the person was previously a prohibited person (as set forth in 11 *Del. C.* § 1448), the offense becomes a Class C felony. In this case, Mills was previously a prohibited person and the offense became a Class C felony. The maximum penalty for a Class C felony is 15 years and because the firearm charge was a violent offense, the minimum sentence the Court was required to impose was 15 years.²⁰

RULE 61 MOTION AND COUNSEL'S MOTION TO WITHDRAW

16. On August 23, 2018, Mills filed the subject Rule 61 motion and an accompanying motion for the appointment of counsel. The Superior Court granted the appointment of counsel and, thereafter, counsel was appointed to assist Mills with his Rule 61 motion.

¹⁸ See, Superior Court Docket Nos. 61 & 62.

¹⁹ Superior Court Docket No. 63- Superior Court's October 20, 2016 letter denying Mills' motion for correction of sentence.

²⁰ *Id.*

17. On September 30, 2019, assigned counsel filed a Motion to Withdraw as Postconviction Counsel pursuant to Superior Court Criminal Rule 61(e)(7). Superior Court Criminal Rule 61(e)(7) provides that:

If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.

18. In the motion to withdraw, Mills' Rule 61 counsel represented that, after undertaking a thorough analysis of Mills' claims, counsel has determined that the claims have no merit and that counsel cannot ethically advocate for any claim for relief.²¹ Rule 61 counsel further represented that, following a thorough review of the record, counsel was not aware of any other substantial claim for relief available to Mills.²²

19. On September 30, 2019, Mills' Rule 61 counsel advised Mills of his motion to withdraw and advised that he had the right to file a response thereto within 30 days, if Mills desired to do so.²³

²¹ See, Superior Court Docket Nos. 73 & 74- Defendant's Rule 61 counsel's Motion to Withdraw along with the accompanying Memorandum in Support of Motion to Withdraw and appendix.

²² Superior Court Docket No. 73- Rule 61 Counsel's Memorandum in Support of Motion to Withdraw, at pgs. 1, 17.

²³ See, Superior Court Docket No. 73- letter dated September 30, 2019 advising Mills of the Motion to Withdraw and having 30 days to file a response thereto.

20. In response to counsel's motion to withdraw, Mills filed a motion to deny the withdrawal of counsel.²⁴ In Mills' motion to deny the withdrawal of counsel, Mills contended that his Rule 61 counsel should not be permitted to withdraw because, among other things, counsel applied an improper standard of review that is applicable to guilty pleas but that is not applicable to his *Robinson* plea.²⁵ Mills is incorrect in this regard. Essentially, a *Robinson* plea operates as a guilty plea and the same standard of review applies.²⁶

21. In order to evaluate Mills' Rule 61 motion and to determine whether his Rule 61 counsel's motion to withdraw should be granted, the court should be satisfied that Rule 61 counsel made a conscientious examination of the record and the law for claims that could arguably support Mills' Rule 61 motion. In addition, the court should conduct its own review of the record in order to determine whether Mills' Rule 61 motion is without merit.²⁷

22. In the subject Rule 61 motion, Mills raises two claims: (1) Mills is entitled to a reduction of the PFBPP sentence to 10 years; and (2) Mills was entitled to a competency hearing due to his history of mental illness.

²⁴ Superior Court Docket No. 75- Mills' motion to deny withdraw of counsel.

²⁵ *Id.*

²⁶ *Rogers v. State*, 2018 WL 5881536, *3 (Del.); *Duffy v. State*, 2012 WL 4019037, *1, fn. 2 (Del. 2012)(*Robinson* plea permits the acceptance of a guilty plea in the absence of an admission of guilt); See also, *Mills v. State*, 2016 WL 97494, fn. 9 (Del.)(Mills entered into a *Robinson* plea to Robbery in the First Degree. A *Robinson* plea permits the acceptance of a guilty plea in the absence of an admission of guilt); November 7, 2014 Plea Transcript, at *6 (at plea colloquy, Superior Court advised Mills that *Robinson* plea operates the same as a guilty plea).

²⁷ *Matos v. State*, 2015 WL 5719694, *2 (Del.).

23. For the reasons discussed below, Mills' Rule 61 motion should be denied.

Claim One: Reduction of the PFBPP Sentence to 10 Years

24. In the subject Rule 61 motion, Mills claims that his PFBPP sentence should be reduced to 10 years.

25. First, Mills' claim is procedurally barred because this motion is untimely. Rule 61(i)(1) requires that to be timely the motion must be filed within one year of the final order of conviction. In this case, Mills' conviction became final in January 2016.²⁸ The Delaware Supreme Court issued its decision on direct appeal on January 6, 2016, and the mandate issued on January 26, 2016. This Rule 61 motion was filed on August 23, 2018, over 2 ½ years later, outside the applicable one-year limit. Mills claims at this late date are time-barred.

26. Second, in addition to being untimely, Mills' claim is also procedurally barred by Rule 61(i)(4) as previously adjudicated. Mills previously filed a motion for correction of sentence contending that he should not have received a 15-year sentence on the PFBPP charge. The Superior Court explained that the 15-year minimum-mandatory sentence on the PFBPP charge was required by law to be imposed and was appropriate and proper in all respects.²⁹ This claim is now procedurally barred as previously adjudicated.

²⁸ Super.Ct.Crim.R. 61(m)(2)(conviction becomes final when the Delaware Supreme Court issues its mandate or order on direct appeal).

²⁹ Superior Court Docket No. 63- Superior Court's October 20, 2016 letter denying Mills' motion for correction of sentence.

27. Third, Mills agreed to the terms of the plea agreement, which provided for a recommended 18-year unsuspended Level V prison term. Mills cannot now attempt to revise/change the terms of the plea agreement. The plea agreement expressly provided that the parties agreed to jointly recommend 18 years Level 5 prison time (minimum mandatory) at sentencing.³⁰ The plea agreement was negotiated between the parties and both parties are bound by the terms of their agreement.

28. Mills' 15-year minimum-mandatory sentence on the PFBPP conviction was authorized by law, was agreed to by Mills, and was already determined by the Superior Court to be appropriate and proper in all respects.

29. For the sake of completeness, it is noted that Mills now contends that he should not have been sentenced as a habitual offender because some of his predicate felonies should not have counted towards his habitual status. As such, Mills contends he received an unjust enhanced sentence.

30. However, the plea agreement expressly provided that Mills would not oppose his habitual status.³¹ The plea agreement further provided that "Defendant admits he is a habitual offender due to the following convictions: Unlawful Transportation of Firearms (2004, Federal), Escape After Conviction (2000); Attempted Burglary 2nd (2000), PWITD (1997)."³²

³⁰ See, Superior Court Docket No. 46- November 7, 2014 Plea Agreement.

³¹ November 7, 2014 Plea Agreement.

³² *Id.*

31. Mills cannot pick and choose which provisions of the plea agreement he wants to leave in place and which ones he wants to unilaterally revise. The Superior Court, and thereafter, the Delaware Supreme Court on direct appeal already held that there was no basis to withdraw the plea. Mills is bound by the terms of his plea agreement.

32. Moreover, the predicate felonies relied upon were, in fact, proper predicate violent felonies. Mills' predicate felony of possession with intent to deliver (PWITD) was and is a violent felony under 11 *Del. C.* § 4201(c). As such, it is a predicate violent felony under Delaware's habitual statute.³³

33. Mills reliance on *Shabazz*³⁴ to support his contention that his Attempted Burglary Second Degree conviction should not have been used as a predicate felony is misplaced and incorrect. The *Shabazz* case involved construction of the *federal* Armed Career Criminal Act, not Delaware's habitual offender statute.³⁵

34. *Shabazz* has no applicability to Mills' case because Mills was sentenced in Delaware state court under established Delaware state law. Mills was properly declared a habitual offender under established Delaware state law. Moreover, Mills expressly agreed not to oppose his habitual offender status and to be sentenced as a habitual offender under 11 *Del. C.* § 4214(a).

³³ See, November 7, 2014 Plea Transcript, at pg. 6-7.

³⁴ *United States v. Shabazz*, 2017 WL 4684180 (D.Del. 2017).

³⁵ *Id.*

35. Mills' claim for a sentence reduction is procedurally barred and otherwise without merit. The sentencing was proper and based on legitimate predicate felonies.

Claim Two: Entitlement to Competency Hearing

36. Mills' second claim is that he was entitled to a competency hearing due to his history of mental illness.

37. First, this claim is also procedurally barred because this motion is untimely. As discussed above, this Rule 61 motion was filed well after the one-year limit had elapsed. As such, Mills' claims at this late date are time-barred and should not be considered.

38. Second, as to Mills' competency, his trial counsel had him evaluated and he was found to be competent.³⁶ There was no basis or need for a competency hearing. Although Mills suffers from cognitive limitations, the professional evaluation made it clear that he was competent.³⁷

39. Mills' claim that he was entitled to a competency hearing is procedurally barred and otherwise without merit.

³⁶ See, Superior Court Docket No. 24- Motion and Order granting competency evaluation; Superior Court Docket No. 73- Rule 61 counsel's memorandum in support of motion to withdraw, at pg. 6, 15 (the psychological report was submitted by Dr. Donohue on August 14, 2014. The report noted that Mills received social security disability payments for mental disability due to borderline intellectual functioning but concluded that Mills was competent to stand trial based on established testing methods).

³⁷ *Id.*

Additional Contentions Raised in the Subject Rule 61 Motion

40. Although Mills only raised the two claims addressed above, Mills also appears to contend that the evidence was insufficient to support his PFBPP conviction.

41. The Delaware Supreme Court has already held that Mills waived any such claims as to the legality of the search and the sufficiency of the evidence by entering into his guilty plea.³⁸

42. Moreover, Mills' present contention that the factual basis for the PFBPP charge was not established is directly at odds with the record that the gun was found in Mills' bedroom where he had identification next to the firearm.³⁹ It is also directly at odds with Mills' representation at the plea colloquy that the gun was in his possession and he knew he was not entitled to possess it.⁴⁰

43. Any contention regarding the sufficiency of the evidence was waived upon the entry of Mills' plea and is also without merit.

44. Finally, to the extent that Mills contends that his trial counsel provided ineffective assistance in any regard, any such contention is waived, procedurally barred and without merit.

45. In order to prevail on an ineffective assistance of counsel claim in the context of a plea challenge, Mills must demonstrate that (1) his defense counsel's conduct

³⁸ *Mills v. State*, 2016 WL 97494 (Del.).

³⁹ *Id.*

⁴⁰ November 7, 2014 Plea Transcript, at pgs. 9-10, 12.

fell below an “objective standard of reasonableness,” and (2) the deficient performance prejudiced the defense.⁴¹ The first prong requires Mills to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.⁴²

46. In the context of a plea challenge, it is not sufficient for the defendant to simply claim that his counsel was deficient. The defendant must also establish that counsel’s actions were so prejudicial that there was a reasonable probability that, but for counsel’s deficiencies, the defendant would not have taken a plea but would have insisted on going to trial.⁴³ The burden of proving ineffective assistance of counsel is on the defendant.⁴⁴ Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.⁴⁵

47. In the subject action, Mills’ plea represented a rational choice given the pending charges, the overwhelming evidence against him, and the multiple life sentences he was facing if convicted at trial and sentenced as a habitual offender. Mills entered into his plea knowingly, intelligently and voluntarily. Mills has not

⁴¹ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

⁴² *Id.* at 687-88, 694.

⁴³ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Hickman v. State*, 1994 WL 590495 (Del.) (applying *Strickland* to guilty pleas).

⁴⁴ *Oliver v. State*, 2001 WL 1751246 (Del.).

⁴⁵ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

established that counsel was deficient in any respect nor that Mills was prejudiced in any way by counsel's representation.

48. In addition, the record reflects that, at the time Mills entered into his plea, he was satisfied with the advice and representation of counsel.⁴⁶ Mills is bound by his representations during the plea colloquy and by his answers on the Truth-in-Sentencing Guilty Plea form in the absence of clear and convincing evidence to the contrary.⁴⁷ Mills has not presented any clear, contrary evidence to call into question his prior testimony at the time he entered into his plea.

49. Mills has not established that his trial counsel was deficient in any respect or that he has suffered any actual prejudice therefrom. To the extent Mills raised any ineffective assistance of counsel contentions, they are procedurally barred as untimely, waived as a result of the entry of the plea, and without merit.

CONCLUSION

50. After a careful review of the record, the Court concludes that Mills' Rule 61 motion is without merit. The Court is also satisfied that Mills' Rule 61 counsel made a conscientious effort to examine the record and the law and has properly determined that Mills does not have a meritorious claim to be raised in his Rule 61 motion. The State's case against Mills was very strong. Although Mills accepted a plea that was

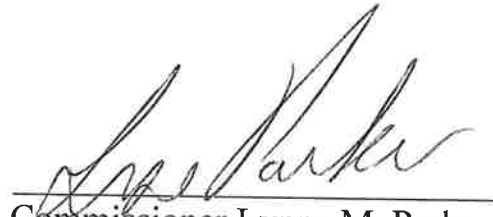
⁴⁶ November 7, 2014 Plea Transcript, at pg. 12; Truth-in-Sentencing Guilty Plea Form dated November 7, 2014.

⁴⁷ *Evans v. State*, 2016 WL 6196456 (Del.); *State v. Harden*, 1998 WL 735879, *5 (Del.Super.); *State v. Stuart*, 2008 WL 4868658, *3 (Del.Super. 2008).

harsh, the plea was ultimately better than any outcome he could have realistically hoped for at trial.

In light of the absence of any meritorious postconviction claims, Mills' Motion for Postconviction Relief should be DENIED, Rule 61 counsel's motion to withdraw should be GRANTED, and Mills' motion to deny the withdrawal of counsel should be DENIED.

IT IS SO RECOMMENDED.


Commissioner Lynne M. Parker

cc: Prothonotary
Darryl J. Rago, Esquire
Mr. Floyd Mills